No. 641

Supreme Court of the United States

October Term, 1946.

LOUISVILLE PROVISION COMPANY, - Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

ALPHABETICAL LIST OF CASES.

Table of Statutes and Regulations Cited.

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v.

COMMISSIONER OF INTERNAL REVENUE, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered on February 12, 1946 (R. 680); a timely

petition for rehearing was denied on May 28, 1946 (R. 704); and on August 15, 1946, this Court extended the time for the filing of this petition for writ of certiorari to and including October 26, 1946.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347(a)).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case arises under Section 501 of Title III of the Revenue Act of 1936, commonly known as the "Unjust Enrichment Tax Act," and results from a deficiency of unjust enrichment taxes assessed against petitioner for the taxable year ended October 31, 1935 (petitioner's fiscal year), in the amount of $56,692.64, with a penalty of $14,173.16 on account of a belated return (R. 11).

Inasmuch as petitioner, in both the Tax Court and the Circuit Court of Appeals, assailed the deficiency assessment as arbitrary and illegal, for the reason that the Commissioner made same without any evidence, actual or presumptive, to support same, and in violation of the applicable law, and inasmuch as this petition is bottomed upon the contention that the Tax Court and the Circuit Court of Appeals improperly sanctioned such arbitrary and illegal action of the Commissioner, a somewhat more detailed statement of the matter involved is required than customarily is

made in petitions to this Court for writs of certiorari. For reasons which will later appear, we shall divide this statement into two parts.

PART ONE.

Petitioner, a Kentucky corporation, was organized and began business in Louisville, Kentucky, as a meat packer in November, 1932, approximately one year prior to the effective date (November 5, 1933) of the processing tax on the *first domestic processing* of hogs imposed by the Secretary of Agriculture under the authority of the First Agricultural Adjustment Act, which tax was continuously in effect until declared unconstitutional by this Court on January 6, 1936, in *United States* v. *Butler,* 297 U. S. 1.

The processing tax which accrued against petitioner for the last ten months of its taxable and fiscal year ended October 31, 1935, and amounting to $95,048.62, was not paid because petitioner, under the protection of an injunction, was contesting the validity of the tax in a suit in the United States District Court for the Western District of Kentucky, which was still undisposed of on January 6, 1936, when the tax was declared unconstitutional (R. 596-597).

The Commissioner of Internal Revenue ruled that the entire amount of unpaid processing tax, computed by him to be $87,058.73 instead of $95,048.62, was income to petitioner and subject to the unjust enrichment tax under Title III of the Revenue Act of June 25, 1936, which tax by the terms of the Act retroac-

tively applied to any taxable year ending in 1935. Section 501(a)(1) of Title III, under which the Commissioner assessed the tax, imposes:

> "A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed." (Section 501(a)(1), Title III Revenue Act of 1936, Section 700(a)(1), Title 26 U. S. C. A.).

The Unjust Enrichment Statute (Section 501(e)) sets up a formula for determining *prima facie* the extent, if any, to which a taxpayer shifted to others the burden of any Federal excise tax imposed upon, but not paid, by him. The statute in substance provides for a comparison of the margin per unit in terms of the basis on which the Federal excise tax was imposed for the tax period with the average margin per such unit for the six-year period immediately preceding the date of the tax, and the extent to which the margin per unit for the tax period exceeds the average margin for the six-year base period is *prima facie* presumed to be the extent to which the taxpayer shifted to others the burden of such Federal excise tax. The statute further provides:

> "that if during any part of such six-year period the taxpayer was not in business, or if his records

> for any part of such period are so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced."

Under the statute, irrespective of the amount resulting from the statutory computation above referred to, in no event can the income subject to the tax exceed the amount of Federal excise tax which accrued and was not paid during the taxable year, or the taxpayer's "net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed," whichever is the lesser amount.

Petitioner's unjust enrichment tax return for the taxable year ended October 31, 1935, was filed after it was due under the statute and under the regulations, and showed no income subject to the tax; but inasmuch as petitioner had been in business only one year prior to the effective date of the tax, of course, its return could not and did not contain the figures or data upon which to make a comparison of the margin per unit for the tax period with the average margin per unit for the six years immediately preceding the effective date of the tax; and the Commissioner, in his thirty-day letter advising of his intention to make a deficiency assessment of unjust enrichment taxes, stated:

> "In view of the fact that the taxpayer has no base period, the company having been incorpor-

ated November 23, 1932, it is not possible to compare the tax period with the six years preceding" (R. 393).

Nevertheless, the Commissioner ruled that the taxpayer shifted to others the burden of the entire amount of unpaid processing tax which had accrued against petitioner for the year here in question, although he did not have, as his own notice showed, the benefit of any statutory *prima facie* presumption of the extent to which the burden of the tax was shifted, or any substantive proof whatever that the burden of any part of the unpaid processing tax had been shifted to others.

The uncontradicted evidence before the Tax Court showed the foregoing facts and petitioner contended that such showing overcame the *prima facie* presumption of the correctness of the Commissioner's ruling as to the tax shift, and that under *Helvering* v. *Taylor*, 293 U. S. 507, the burden fell upon the Commissioner to show by competent evidence the actual extent to which the burden of the processing tax was shifted to others; and that having failed to offer any such evidence on the subject, there should be a judgment of no deficiency. The Tax Court overruled this contention and the Sixth Circuit Court of Appeals concurred. Each of those courts held that under the unjust enrichment tax law, if a taxpayer is unable to show his average margin per unit for the six years immediately preceding the effective date of the Federal excise tax because he had not been in business during those six years, the burden is upon him, and not upon the Commissioner, to show in his return the average margin for

the six-year period immediately preceding the effective date of the tax of representative concerns engaged in a similar business or similarly circumstanced, or data from which that margin may be computed, and that petitioner having failed to do this, the Commissioner was authorized to find that the burden of the entire amount of the unpaid processing tax had been shifted to others (R. 602, 684). This ruling of the Circuit Court of Appeals for the Sixth Circuit is in conflict with the ruling of the Circuit Court of Appeals for the Seventh Circuit on the same question in *Pyramid Coal Corp.* v. *Commissioner,* 138 F. (2d) 748. Such ruling of the Circuit Court of Appeals for the Sixth Circuit is also probably in conflict with the applicable decisions of this Court, and in this case operated to deprive petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

PART TWO.

After having made his unsupported finding that the burden of the entire amount of the unpaid processing tax was shifted by petitioner to others, the Commissioner proceeded to compute the net income of petitioner for its taxable year ended October 31, 1935, "from the sale of articles with respect to which such Federal excise tax was imposed." In computing such net income, the statute restricted the Commissioner to income resulting from the sale of articles in respect of which petitioner was subject to the processing tax.

The First Agricultural Adjustment Act authorized the Secretary of Agriculture, under the conditions and for the purposes therein stated, to impose a processing tax upon the *first domestic processing* of basic agricultural commodities (Section 609(a), Title 7 U. S. C. A.), and hogs were included as one of the basic agricultural commodities (Section 611, Title 7 U. S. C. A.). The processing tax statute did not define the phrase "first domestic processing of hogs," leaving the definition thereof to the Secretary of Agriculture (Section 609(d)(8), Title 7 U. S. C. A.). The regulations promulgated by the Secretary of Agriculture to implement his proclamation imposing the processing tax on the first domestic processing of hogs, and which were in force during the entire taxable year ended October 31, 1935, among other things, provided (T. D. 4518):

> "FIRST DOMESTIC PROCESSING.—The term 'first domestic processing' means the slaughter of hogs for market; except that (a) in the case of a producer or feeder who shall distribute the carcass or any edible hog product directly to a consumer, the term 'first domestic processing' means the preparation of the carcass or any edible hog product for sale, transfer or exchange or for use by the consumer, and only the edible product or products so sold, transferred, exchanged or distributed by or for the producer or feeder shall be deemed to have been processed, and (b) in the case of a producer or feeder who shall sell, transfer or exchange any carcass or edible hog product (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market (including, but not limited to, retailers,

wholesalers, distributors, butchers, packers, factors, or commission merchants), or (2) to any restaurant, hotel, club, hospital, institution, or establishment of similar kind or character, the term 'first domestic processing' means the initial act of such person, restaurant, hotel, club, hospital, institution, or establishment which involves the preparation of the carcass or any edible hog product for further distribution or use."

* * * * * * *

"FEEDER.—The term 'feeder' means any individual or individuals, actively and regularly engaged in the fattening of hogs for market, or in farming operations, a part of which is the fattening of hogs, except retailers, wholesalers or distributors of meat, butchers, abbatoirs, slaughter houses, packers, factors or commission merchants."

"PRODUCER.—The term 'producer' means the individual or individuals who own the hog at the time of farrowing."

In addition to purchasing cattle, sheep and hogs and slaughtering them itself, and selling the products of that slaughter, petitioner bought meat products produced from livestock slaughtered by other packers and sold same either in the condition in which purchased or after same had been further processed by it. It also bought from others dressed fowls, butter, fish, cheese, canned meats, etc., designated in the record as "produce, compound, etc.," all of which it sold in the same condition in which it was purchased (R. 66). The sausage manufactured and sold by petitioner was

made in part from meats of its own slaughter and in part from meats purchased from other packers. Except for its brand of pure pork sausage, the meat in the sausage was beef and pork in combination, the proportion of the two meats in the aggregate amount of sausage manufactured and sold by petitioner during the tax period being approximately 40% pork and 60% beef (R. 80, 205).

Prior to the enactment of the Unjust Enrichment Statute, which was after the close of petitioner's fiscal and taxable year ended October 31, 1935, there had been no occasion for petitioner so keeping its books and records as to show separately the net income attributable to the sale of pork produced from hogs slaughtered by it, and its books were not so kept. However, it was possible from an analysis of petitioner's records to segregate the sales attributable to beef, purchased pork, and to own-slaughter pork, and to produce, compound, etc., respectively. Petitioner's records also disclosed the total sales receipts from sausage and, separately, the total weight of beef, purchased pork and own-slaughter pork used in the manufacture of same (R. 69, 70, 80, 81).

Some of the deductible costs and expenses incurred by petitioner in the conduct of its business were identifiable from its books as attributable exclusively to a particular product, that is, to beef, purchased pork, own-slaughter pork, produce, compound, etc., or sausage, as the case might be. A great many of those expenses were incurred in part in respect of one product and in part in respect of another, and, therefore, the

amount attributable to own-slaughter pork in determining the net income in respect thereof could be ascertained only by some fair system of allocation, as the Unjust Enrichment Tax Statute itself recognized and permitted (Section 700(c)(1), Title 26 U. S. C. A.).

In making his computation of net income attributable to the sale of articles with respect to which the processing tax was imposed, the Commissioner combined all pork sales, whether of purchased pork or of own-slaughter pork, and all sausage sales, treating the aggregate thereof as pork sales (R. 25, 39). He then proceeded to eliminate from that aggregate figure what he determined to be the sales price attributable to purchased pork products. He determined this sales price by adding to the cost price of purchased pork an arbitrary write-up of one and one-half cents per pound (R. 17, 39, 615). The Commissioner had no basis whatever for this action, and on the trial offered none (R. 39, 615). After deducting his arbitrary figure representing the sales price of purchased pork from the figure determined by him to represent the aggregate sales price of all pork products, he treated the remainder as the sales price of products in respect of which the processing tax was imposed (R. 17, 615). This method of computation left in the amount determined by the Commissioner to be the sales price of own-slaughter pork products which were the articles with respect to which the processing tax was imposed upon petitioner, the entire sales price of all sausage sold by petitioner and amounting, according to the Commis-

sioner's own computation, to $251,350.48 (Petitioner's original Exhibit 23, R. 17, 615). The weight of all the meat used in making this sausage (own-slaughter pork, purchased pork and beef) was 1,420,888 pounds, of which only 391,319 pounds were of own-slaughter pork (Petitioner's original Exhibit No. 19 brought up with the record). This left 1,029,569 pounds as the weight of purchased pork and beef used in that sausage. The total amount of purchased pork sold by petitioner in whatever form, including that used in sausage, as found by the Commissioner, was 1,061,954 pounds (R. 17), and this amount was accepted as correct by the Tax Court (R. 616). The total weight of the purchased pork sold other than in sausage form was 767,080 pounds (Petitioner's original Exhibit 17 brought up with the record), which subtracted from the 1,061,954 pounds leaves 294,874 pounds of purchased pork in sausage, which when subtracted from 1,029,569 pounds, the combined weight of purchased pork and beef in sausage, leaves 734,695 pounds as the amount of beef used in the manufacture of sausage. This figure is subject to a reduction of 52,000 pounds of beef which it was agreed was made into chili in the sausage department, the sales price of which is not reflected in the $251,350.48 found by the Commissioner to represent the sales price of sausage (R. 33). Thus, the Commissioner's computation left in the gross income attributable to own-slaughter pork the sales price attributable to 682,695 pounds of beef in sausage, which, of course, in sausage form brought as much per pound as did the own-slaughter pork used therein.

The Commissioner included in his computation of gross income attributable to the sale of own-slaughter pork products for the taxable year, $899.18 of bad debts which had been charged off in previous years and collected during the taxable year in question. He also included in such gross income $6,672.90 representing rent collected from others for property not used by it in the operation of its business.

In determining the net income attributable to own-slaughter pork, it was necessary to make an allocation of over $200,000 deductible plant, manufacturing and administrative expenses as between own-slaughter pork and other products, for the reason that those expenses were incurred in part in respect of pork operations and in part in respect of beef and produce operations. The Commissioner allocated those expenses as between beef, pork and produce at exactly the same amount per pound of the products sold (R. 39), notwithstanding the uncontradicted evidence showed that the cost per pound of slaughtering and processing pork was much greater than the per pound cost of slaughtering and processing beef for market (R. 287, 326, 421, 590), and notwithstanding the further fact that petitioner incurred no manufacturing or processing cost whatever in respect of produce, compound, etc., purchased and sold by it (R. 66, 589).

The Tax Court held that in determining the net income from the sale of articles in respect of which the processing tax was imposed, consideration could be given only to the sale of products of own-slaughter pork and that as to composite products made in part of

own-slaughter pork and in part of beef and purchased pork, the applicable rule was found in its decision in *Standard Knitting Mills, Inc.*, 47 B. T. A. 295, which, in effect, held that after deducting from the aggregate sales of such a composite product the cost attributable thereto, the net profit resulting, if any, should be apportioned to the different products entering into the compound in the proportion that the weight of each is to the total weight of the article (R. 615-616). It also held that there was no basis whatever for the Commissioner's determination of the selling price attributable to purchased pork by adding to the cost thereof an arbitrary write-up of one and one-half cents per pound. The Tax Court thereupon undertook to determine for itself by a formula of its own the sales price attributable to purchased pork which should be deducted from the amount determined by the Commissioner to be the aggregate sales price of all pork products.

The Tax Court accepted the Commissioner's finding that the live weight of all pork slaughtered by it during the taxable year was 6,518,338 pounds, and also the Commissioner's finding that the weight of all the pork products purchased from others and sold by petitioner, in whatever form, including sausage, was 1,061,954 pounds, which weight it converted to live weight by using a shrinkage factor of 30% from live weight to dressed weight, thus, ariving at 1,517,077 pounds as the live weight of purchased pork, which, when added to the live weight of pork slaughtered by petitioner, gave a total live weight attributable to purchased pork and own-slaughter pork of 8,035,415

pounds. The Tax Court accordingly found that the live weight of purchased pork was 18.87+% of the combined live weight of purchased and own-slaughter pork. It accepted the Commissioner's figure which placed the net sales price attributable to all pork, including sausage, at $177,446.82, and applying 18.87+% to this aggregate sales price, the Court found $222,300.59 (R. 615, *et seq.*) as the aggregate sales value attributable to all purchased pork, instead of the $178,922.54 as found by the Commissioner through his use of an arbitrary write-up of one and one-half cents per pound (R. 17, 25). This amounted to a finding by the Tax Court that by his arbitrary write-up device, the Commissioner had overstated the net income from the sale of own-slaughter pork products (articles with respect to which the processing tax was imposed) by the sum of $43,-378.05 (R. 658).

The Tax Court's computation (R. 615, *et seq.*) improperly left in the aggregate sales value attributable to own-slaughter pork, the entire sales price attributable to beef in sausage and which, at the average sales price at which the sausage was sold, amounted to over $118,000.00 (Petitioner's petition for rehearing, R. 638). When this was called to the attention of the Court on petition for rehearing (R. 638, *et seq.*), the Court brushed the matter aside on the wholly unfounded ground that it had eliminated the sales price attributable to beef in sausage in its computation above referred to (R. 652).

The Tax Court held that there was no basis whatever for the inclusion of the $899.18 bad debt item or

the rent item of $6,672.90 in income attributable to own-slaughter pork.

Thus, in respect of the three items above mentioned, the Tax Court found that the Commissioner had overstated the gross income of petitioner from the sale of articles in respect of which the processing tax was imposed by $50,950.13.

Of course, inasmuch as the Tax Court's computation was an attempt to make a readjustment in the Commissioner's own computation, it necessarily follows that it found that the Commissioner had likewise overstated the net income of petitioner by the sum of $50,950.13.

Notwithstanding the Tax Court rejected the Commissioner's deficiency assessment as excessive and unfair because it improperly included in gross income from the sale of articles in respect of which the processing tax was imposed, items amounting to $50,950.13 which should not have been included therein, nevertheless, when it came to consider the Commissioner's allocation of costs and expenses to be deducted from gross income in arriving at net income, it accepted every single one of them as *prima facie* correct, including his allocation of plant, manufacturing and administrative expenses to beef, pork and produce at exactly the same amount per pound; and this, *notwithstanding the Court had found as a fact that it cost petitioner more per pound to manufacture and process pork than it did beef, and that there were no manufacturing or processing costs in respect of produce, and notwithstanding its finding that the Com-*

missioner's method of allocating those costs, which it accepted as prima facie correct, disregarded this difference in cost (R. 619).

The Circuit Court of Appeals affirmed the Tax Court, except that it held the Tax Court committed error against the Commissioner in allowing as a deductible item, in determining net income, $18,588.34 of attorney fees. Petitioner makes no issue of the judgment of the Circuit Court of Appeals in respect of this item.

The Circuit Court of Appeals, in its original opinion, held that the Tax Court made no clear-cut mistake of law to the prejudice of petitioner in respect of the net income of petitioner from the sale of articles in respect of which the processing tax was imposed, and that its findings were supported by substantial evidence; that the Tax Court committed no error of law in accepting as *prima facie* correct the computations and allocations made by the Commissioner in his determination of net income from own-slaughter pork, notwithstanding its finding that the Commissioner's computation and allocations had resulted in the assessment of an excessive tax. The Circuit Court of Appeals further held that even if the Tax Court did leave in gross income from own-slaughter pork the sales price attributable to beef in sausage, petitioner was not prejudiced for the reason that both the Commissioner and the Tax Court had erroneously failed to include in petitioner's gross income from the sale of articles in respect of which the processing tax was imposed the sales from purchased pork; this on the

ground that had those sales been included, they would have more than counter-balanced any over-statement of gross income complained of by petitioner. The Circuit Court of Appeals based its opinion that the sales from purchased pork should have been included in such gross income upon the paragraph of the regulations entitled "First Domestic Processing," quoted at pages 8 and 9 of this petition. On this point, the Court said:

> "Also, under the applicable regulations this tax should have been laid not only upon own-slaughter pork, but upon purchased pork. The amount of $222,300.59, calculated by the Tax Court to be the amount realized from the sale of articles containing purchased pork should have been included in its computation of the net taxable income" (R. 686-687).

Then, after quoting the regulations above referred to, the Court proceeded to state:

> "These regulations were not cited nor mentioned in the record, nor at the hearing in this court.
>
> "Under the express requirement of the above regulations not only was the net income from the sale of own-slaughter hogs taxable, but also the net income from the curing and smoking of hams and bacon and other pork products and the preparation of sausage, whether made from own-slaughter pork or purchased pork. The taxpayer was not only a producer which slaughtered its own hogs; it also 'engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing' edible hog products which it had purchased

from other producers. The first domestic processing upon which the processing tax was to be levied, therefore, included not only the slaughter of hogs for market, but also taxpayer's initial acts in preparing purchased pork for further distribution or use. The tax should have been laid upon the taxpayer's edible products, containing purchased pork as well as own-slaughter pork. This would add to the net income received from the sale of articles containing own-slaughter pork such an increased amount that the finding of deficiency may well err on the side of being too small rather than too large."

On petition for rehearing, petitioner pointed out that when the regulations relied upon by the Court are read in connection with the definition of the word "producer" contained in the same regulations, and quoted at page 9 of this petition, they could not possibly be construed as imposing a processing tax upon petitioner in respect of pork purchased, and that no official of the Government had ever so construed them. Thereupon, the Court, instead of frankly acknowledging its error, switched to the still more startling proposition that irrespective of the regulations, the Agricultural Adjustment Act itself imposed a processing tax upon petitioner in respect of its purchased pork (R. 705). The decision of the Circuit Court of Appeals on this question was directly contrary to the decision of the Tax Court on the same question in the same case, and contrary to the processing tax provision of the Agricultural Adjustment Act and the regulations pro-

mulgated thereunder, and to the interpretation of the Act by those charged with its enforcement.

On petition for rehearing, the Circuit Court of Appeals also held that the Commissioner was correct in his contention that the entire proceeds from the sale of sausage should be treated as income from the sale of articles in respect of which the processing tax was imposed, and that the Tax Court was wrong in holding otherwise. In so deciding, the Circuit Court of Appeals' opinion is in conflict with the opinion of the Tax Court on the same subject in the same case and with the opinion of the Tax Court in *Standard Knitting Mills, Inc.*, 47 B. T. A. 295, *supra,* and with the Sixth Circuit's own opinion affirming the *Standard Knitting Mills, Inc.* case, 141 F. (2d) 195, and in conflict with the provisions of Section 501(a)(1) of Title III of the Revenue Act of 1936 (Unjust Enrichment Statute).

QUESTIONS PRESENTED.

The questions presented under PART ONE of the statement are:

1. Was the Circuit Court of Appeals in error in holding that the Tax Court and it were bound by the finding of the Commissioner that petitioner had shifted to others the burden of the entire amount of unpaid processing tax which accrued against it for the taxable year, notwithstanding the uncontradicted proof that the Commissioner had no evidence before him of any character that any portion of said tax was shifted to others, and did not have the benefit of any *prima facie* presumption resulting from the statutory com-

putation and comparison of margins provided for in the Unjust Enrichment Tax Statute?

2. Under the facts set forth in PART ONE of the statement and summarized in Question 1 above, should there have been a judgment of no deficiency?

The questions presented under PART TWO of the statement are:

1. Was the Circuit Court of Appeals in error in holding that the Tax Court committed no clear-cut mistake of law in its computation made to correct the Commissioner's computation of the net income of petitioner from the sale of articles in respect of which the processing tax was imposed?

2. Was the Circuit Court of Appeals in error in holding that there was substantial evidence to support the Commissioner's allocation of plant, manufacturing and administrative expenses to beef, pork and produce at the same amount per pound?

3. Was the Circuit Court of Appeals in error in approving the action of the Tax Court in accepting as *prima facie* correct the computations and allocations made by the Commissioner in his determination of net income from the sale of articles in respect of which the processing tax was imposed, notwithstanding the Tax Court's finding that the net income as determined by the Commissioner was excessive, and necessarily resulted in the assessment of an excessive tax?

4. Was the Circuit Court of Appeals in error in holding that under the law the sales price of purchased pork and the sales price of sausage were includable in gross income of petitioner from the sale of articles in respect of which the processing tax was imposed?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the Circuit Court of Appeals accepting as *prima facie* correct and binding upon it and the Tax Court the finding of the Commissioner that petitioner had shifted to others the burden of the entire amount of unpaid processing taxes under the circumstances set forth in PART ONE of petitioner's Summary Statement, establishes a rule in respect of the administration of Federal tax laws, and especially in respect of contested deficiency assessments and as to the burden of proof in respect thereof, which not only is probably in conflict with the applicable decisions of this Court (*Helvering* v. *Taylor,* 293 U. S. 507), but has the effect of depriving petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

2. The decision of the Circuit Court of Appeals sustaining the Tax Court's computation of net income of petitioner from the sale of articles in respect of which the processing tax was imposed, which computation included as a part of such income the sales value of beef in sausage in respect of which no processing tax was imposed, presents a question of the proper construction of the unjust enrichment tax law which has not been, but which should be, decided by this Court; namely, whether in the computation of net income for the taxable year from the sale of articles in respect of which the Federal excise tax was imposed, there should be included the entire sales price of an article composed in part of products in respect of which the excise tax was imposed and in part of tax-free products.

3. The decision of the Circuit Court of Appeals to the effect that under the Agricultural Adjustment Act, petitioner was subject to unjust enrichment tax in respect of pork products purchased from others, and that, therefore, under the unjust enrichment tax law, all sales of such purchased pork were includable in petitioner's net income for the taxable year from the sale of articles in respect of which the processing tax was imposed, was a construction of the law imposing the processing tax, and a construction of the unjust enrichment tax law, at variance with the construction thereof by those charged with their enforcement and at variance with the applicable decisions of the Tax Court of the United States. The questions presented by that decision are important and they have not been, but should be, settled by this Court.

4. As shown in PART TWO of the Summary Statement, the Tax Court found that the net income as determined by the Commissioner was excessive, which finding of the Tax Court resulted from its further finding that many of the computations entering into the Commissioner's figure of net income were improper and unjustified. Nevertheless, the Tax Court accepted as *prima facie* correct and as substantive evidence all the computations made by the Commissioner in arriving at his figure of net income, except those specifically condemned. The decision of the Circuit Court of Appeals in approving this action of the Tax Court sanctioned such a departure by that court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings of the said Court had in this case, numbered and entitled on its docket, No. 9940, Louisville Provision Company v. Commissioner of Internal Revenue, and No. 9941, Commissioner of Internal Revenue v. Louisville Provision Company, to the end that this cause may be reviewed and determined by this Court, and for such other and further relief as to this Court may seem proper.

LOUISVILLE PROVISION COMPANY,
Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion of the Tax Court (R. 588) was a memorandum opinion, and it and the order denying a motion for rehearing, reconsideration and revision (R. 649) are not officially reported.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 155 F. (2d) 505.

II.

JURISDICTION.

The jurisdictional statement at page 1 of the petition for writ of certiorari is adopted.

III.

STATEMENT OF THE CASE.

The Summary Statement of the Matter Involved in the petition for writ of certiorari is hereby adopted.

IV.

SPECIFICATION OF ERRORS.

(1) The Circuit Court of Appeals erred in holding that it and the Tax Court were bound by the finding of the Commissioner that petitioner had shifted to others

the burden of the entire amount of unpaid processing tax which had accrued against it for the taxable year.

(2) The Circuit Court of Appeals erred in refusing to hold that the Tax Court should have entered a judgment of no deficiency.

(3) The Circuit Court of Appeals erred in holding that the Tax Court committed no clear-cut mistake of law in its computation made to correct the Commissioner's computation of the net income of petitioner from the sale of articles in respect of which the processing tax was imposed.

(4) The Circuit Court of Appeals erred in holding that there was substantial evidence to support the Commissioner's allocation of plant, manufacturing and administrative expenses to beef, pork and produce at the same amount per pound.

(5) The Circuit Court of Appeals erred in holding that under the law the sales price of purchased pork and the sales price of sausage were includable in the gross income of petitioner from the sale of articles in respect of which the processing tax was imposed.

(6) The Circuit Court of Appeals erred in approving the action of the Tax Court in accepting as *prima facie* correct any of the computations and allocations made by the Commissioner in his determination of net income.

V.

ARGUMENT.

(1) The Action of the Circuit Court of Appeals in Approving the Action of the Tax Court in Accepting as Binding Upon It the Commissioner's Finding That the Burden of All the Unpaid Processing Tax Had Been Shifted to Others Was Probably in Conflict With the Applicable Decisions of This Court, and Also Operated to Deprive Petitioner of Its Property Without Due Process of Law.

Helvering v. *Taylor,* 293 U. S. 507, should have cleared up the confusion which had theretofore existed in the lower courts in respect of the burden of proof in deficiency tax assessment cases. That case points out that the rule with reference to the burden of proof which is applicable in suits by taxpayers for refund of taxes is not applicable in a suit involving a deficiency assessment against a taxpayer. That case clearly holds that in such deficiency assessment cases, the burden is upon the Commissioner, and not upon the taxpayer, to prove the correct amount of tax due; that under well-settled principles of law, the presumption that the Commissioner acted correctly is sufficient to sustain the burden imposed upon him, unless and until that action is shown to be incorrect or arbitrary; but once having been shown to be incorrect or arbitrary, he is put to the duty of establishing the correct amount of tax due, and failing so to do the taxpayer is entitled to a judgment of no deficiency.

In this case, it was shown that the Commissioner's finding that the burden of all the tax was shifted to others was supported neither by any facts in his possession nor by any statutory *prima facie* presumption of the extent to which the burden of the processing tax was shifted to others. The Commissioner's computation accompanying his deficiency letter, which was filed as Petitioner's Exhibit No. 23 (R. 11 to 37, inc.), unmistakably shows that he simply determined the amount of tax not paid to be $87,058.73, and without any evidence, actual or presumptive, to support him, arbitrarily found that the burden of that entire amount was shifted to others.

This arbitrary action on the part of the Commissioner was not justified, because of the failure of petitioner to furnish the margin computations provided for in the statute as was held by the lower court (R. 684). Of course, petitioner could not furnish an average margin computation for the six years preceding the effective date of the tax, because it was in business only one of those years. Contrary to the theory advanced by both the Tax Court and the Circuit Court of Appeals, the burden was not upon petitioner to furnish to the Commissioner "the average margin as determined by the Commissioner of representative concerns engaged in a similar business and similarly circumstanced," in lieu of its own margin experience for that period. The statute clearly places upon the Commissioner, and not upon the taxpayer, the duty of determining the average margin of representative concerns engaged in a similar business and similarly cir-

cumstanced. *Pyramid Coal Corp.* v. *Commissioner,* 138 F. (2d) 748.

The arbitrary action of the Commissioner in finding that petitioner shifted to others the burden of the entire unpaid processing tax and the action of the Tax Court and the Circuit Court of Appeals in refusing to require the Commissioner to support such finding by competent evidence, if permitted to stand, will operate to deprive petitioner of its property without due process of law. It will have been condemned without any proof to support the condemnation.

(2) The Tax Court's Computation of the Net Income of Petitioner Which Left in Income Attributable to Own-Slaughter Pork the Sales Price Attributable to Beef in Sausage, and Which Was Approved by the Circuit Court of Appeals as Being Justified Under the Unjust Enrichment Tax Statute, Presents a Question of the Construction of the Unjust Enrichment Tax Law Which Should Be Decided by This Court.

The Tax Court's opinion shows that it intended to follow the rule laid down in *Standard Knitting Mills, Inc.,* 47 B. T. A. 295, *supra,* in the treatment of beef in sausage in its computation of net income from own-slaughter pork. That rule clearly required the exclusion of the sales price of beef from such income. As shown in PART TWO of the Summary Statement in the petition for writ of certiorari, that computation did not accomplish that result. The holding of the Circuit Court of Appeals that under the statute the entire sales price of sausage, including beef, should

be included in such income is so directly in conflict with the opinion of the Tax Court in the case of *Standard Knitting Mills, Inc., supra,* and so at variance with the opinion of the Circuit Court of Appeals itself in *Standard Knitting Mills, Inc.* v. *Commissioner,* 141 F. (2d) 195, and is such an unfair and unnatural construction of the unjust enrichment tax law as to suggest the propriety of a review of the decision by this Court.

(3) The Decision of the Circuit Court of Appeals That the Sales Price of All Purchased Pork Should Be Included in the Computation of Petitioner's Net Income Was an Improper Construction of the Law.

The decision of the Circuit Court of Appeals that all sales of purchased pork were includable as income from the sale of articles in respect of which the processing tax was imposed was an interpretation of the law imposing the processing tax and of the unjustment enrichment tax law completely at variance with the uniform construction of same by the Internal Revenue Department, and wholly unjustified by the terms of the Acts themselves. The packers from whom these pork products were purchased had already paid the processing tax in respect thereof. They had slaughtered the hogs for market, which was defined by the regulations as the "first domestic processing" of hogs in respect of which the processing tax was imposed. If, as held by the Circuit Court of Appeals, petitioner was subject to a processing tax in respect of those pork products, then there were two process-

ing taxes imposed in respect of those products. The statute is susceptible of no such construction, and it is submitted that this Court should take jurisdiction of this case to finally settle this important question of Federal tax law.

(4) The Decision of the Circuit Court of Appeals Approving the Action of the Tax Court in Accepting as Prima Facie Correct the Computations and Allocations Referred to in PART TWO of the Summary Statement in the Petition for Writ of Certiorari Was Erroneous.

As shown in the Summary Statement in the petition for writ of certiorari, the Tax Court condemned as arbitrary and wholly unjustified many of the computations made by the Commissioner in computing net income from the sale of articles in respect of which the processing tax was imposed, with the result that it decided that the ultimate figure of net income was excessive and, of course, of necessity, unfair to petitioner. In other words, the Tax Court found that the Commissioner's figure of net income was wrong. In such situation, of course, the *prima facie* presumption of its correctness disappeared, and under *Helvering* v. *Taylor,* 293 U. S. 507, *supra,* it became the duty of the Commissioner to offer competent proof showing the correct net income. It is well-settled that when a *prima facie* presumption of correctness is overcome and the burden of proof is shifted to the person in whose favor the presumption originally existed, and he is required to go forward with his proof, the *prima facie* presumption cannot be accepted as any proof

whatever in support of his burden. Nevertheless, the Tax Court accepted as *prima facie* correct, and as substantive evidence, most of the computations made by the Commissioner in arriving at the ultimate result, which the Tax Court found to be wrong. Still more startling was the Tax Court's action in respect to the Commissioner's method of allocating more than $200,000 of plant, manufacturing and administrative expenses. The proof conclusively showed, and the Tax Court found, that it cost petitioner more per pound to slaughter and process for market hog products than beef products, and that petitioner had no slaughtering or manufacturing costs whatever in respect of produce, compounds, etc., which were sold in the form in which purchased. It was also shown by proof, as well as by stipulation (R. 39), that the Commissioner in his computation allocated those costs to beef, pork, produce, compounds, etc., at exactly the same amount per pound. While admitting this to be true, and while expressly finding that the Commissioner's method of allocation of these expenses did not give effect to the difference in cost above noted (R. 619), the Tax Court, nevertheless, accepted as *prima facie* correct and binding upon it the Commissioner's method of allocating those expenses. Thus, the Tax Court accepted as correct a computation which it expressly found to be incorrect, and the Circuit Court of Appeals approved this action of the Tax Court. It is submitted that this action of the Tax Court, approved by the Circuit Court of Appeals, constituted such a departure from the accepted and usual course of judicial proceedings

and was so arbitrary and unfair to petitioner as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

LOUISVILLE PROVISION COMPANY,
Petitioner.

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INDEX

CITATIONS

721588—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 641

LOUISVILLE PROVISION COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 588–621) are not officially reported. The opinion of the circuit court of appeals (R. 680–689) and memorandum opinion on the rehearing (R. 704–706) are reported in 155 F. 2d 505.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 12, 1946 (R. 679). A petition for rehearing was denied on May 28, 1946 (R. 703). On August 15, 1946, Mr. Justice

Burton extended the time within which a petition for a writ of certiorari might be filed to and including October 26, 1946 (R. 707). The petition was filed on October 24, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the circuit court of appeals and the the Tax Court erred in upholding the Commissioner's determination that the burden of all the unpaid processing taxes had been passed on by the taxpayer to its customers.

2. Whether the circuit court of appeals and the Tax Court erred in approving the action of the Commissioner in determining the amount of the net income subject to the unjust enrichment tax imposed by Section 501 of the Revenue Act of 1936.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set out in the Appendix, *infra,* pp. 17–23.

STATEMENT

The taxpayer, a Kentucky corporation, was organized in 1932, after acquiring most of the assets of a bankrupt corporation of the same name, and has since been engaged in the general meat packing house business. It purchased and slaughtered

cattle, sheep, calves, and hogs and sold the product in its fresh state or otherwise after further processing. (R. 588, 589).

All the beef produced by the taxpayer from its own slaughtering and purchased by it from other packers was sold in a fresh state without further processing except such amounts as were used by it in the manufacture of chili, corned beef, and sausage. Veal and lamb produced by the taxpayer were sold in a fresh state without further processing. Fresh pork purchased by the taxpayer from other packers as well as that produced by it from its own slaughtering was sold by the taxpayer in a fresh state or after further processing into sausage, cured, smoked or cooked meats. Fresh hams purchased by the taxpayer were commingled with like products cut from hogs of its own slaughter and lost their identity. About 99 per cent of the fresh hams purchased by the taxpayer from other packers and cut from hogs of its own slaughter was processed into smoked hams by the taxpayer. From 85 to 90 per cent of the shoulders of hogs were cured and smoked, and practically all of the bacon cuts were processed into bacon. Sausage produced by the taxpayer was manufactured from meats produced from its own slaughter and purchased from other packers. Some of it was manufactured exclusively from pork. Other sausage contained from eight per cent to 80 per cent pork, based upon finished weight, and the remainder beef. All boxed sliced

bacon and boiled and baked hams were of the taxpayer's slaughter. It cost the taxpayer more per pound to process pork than it did to process beef. (R. 590.)

During the time the Agricultural Adjustment Act was in effect, taxes imposed thereunder for the processing of hogs were treated on the books of the taxpayer as part of the cost of hogs. The taxpayer endeavored to recover all of its costs of doing business, including state and federal taxes, and operate at a profit. (R. 591.)

The books of the taxpayer contain separate accounts showing the amounts paid by it for hogs, cattle, calves and sheep and the weight thereof. Purchases of other material for resale were kept in two other accounts. One account, known as the produce account, contained costs of poultry, butter and eggs, and other produce articles, and the other account, captioned "Miscellaneous Meat Purchases" carried all other items purchased for resale or the manufacture of sausage. The accounts did not show the amount paid for each article. Separate accounts were maintained for purchases of spice, salt, casings, cartons, and similar articles, but no allocations of the amounts of each were ever made to departments of the taxpayer's business, *i. e.,* to the beef, produce, compound, inedible, pork and sausage departments. Invoices for all of the purchases are still in the possession of the taxpayer and they show the character and amount of each item. Freight paid

on purchased articles was entered in one account without allocation to the product in respect of which it was paid, and the taxpayer was unable to make an accurate allocation to the several departments of its business. The taxpayer's records show only the gross amount of freight paid on articles sold, and allowances made to vendees. Pay roll records of the taxpayer show the amount paid each employee and the character of work performed by him. Some employees worked in more than one department. Costs of light, heat and power, laundry, repairs, rent, depreciation of machinery and equipment and of similar items were kept in appropriate accounts, but without allocation to the different products in respect of which such costs were incurred. Commissions and expenses, delivery costs and administrative expenses were not allocated on the taxpayer's books among departments. (R. 591–592.)

The taxpayer's receipts from sales were entered in about 25 general classifications. Sales of beef, veal and mutton were carried in one account; separate accounts were maintained for sausage, and various cuts of beef. The taxpayer's records show the amounts received during the taxable year from the sale of each of the different pork products sold by it and the sales weight of each, but without allocation as between own-slaughter pork and pork purchased from other packers. The purchase price of materials purchased on the outside for the manufacture of sausage was

charged to the taxpayer's sausage department as a cost of manufacture. The taxpayer was able to determine from an examination of invoices received for purchased meat whether or not the items were to be sold without or after further processing by it. Beef and pork of the taxpayer's own slaughter used in the manufacture of sausage were charged to the sausage department at the prevailing market price, with a balancing credit to the department from which it was transferred. The charge made for the beef transferred in the taxable year was $62,929.32, this being the value of the meat based upon the Chicago market. Sales of boiled and baked hams were carried in a separate account. The taxpayer's records show the total weight and selling price of beef, veal and mutton sold during the taxable year and the amount received for hides. They also show total receipts from grease, tankage, bones and tallow respectively, but no allocation thereof as between beef and pork or as between own-slaughter pork and purchased pork. Amounts received from the sale of grease were credited by the taxpayer to pork income. (R. 592–593.)

The taxpayer kept a daily record of the amount of beef and pork used in the manufacture of sausage that day and the amount of sausage made each day. The record did not, however, show what portion of the meats was purchased from other packers. The taxpayer's sales records show the pounds of sausage sold each month and the

amount received therefor, but they contain no allocation as between beef and pork and as between own-slaughter and purchased pork. Invoices in the possession of the taxpayer show the amount of beef and pork purchased for, and used in, the production of sausage. (R. 593.)

The taxpayer's price lists, issued weekly, were based upon the Chicago market, modified, when necessary, to meet local conditions, including supply and demand. The taxpayer's prices were subject to change at any time and occasionally were changed to meet market conditions. No portion of the processing tax imposed upon the taxpayer in 1935 was included as a separate item in invoices for products sold by it, or collected from customers as a separate item. The taxpayer did not pay, as a separate item, processing taxes on pork purchased by it. (R. 593.)

The net sales (gross, less freight and adjustments), cost of sales, distribution expenses, operating profit, and other income and costs of the taxpayer for the taxable year are set out in tabulated form by the Tax Court (R. 594–595). In determining net income for the fiscal year ended October 31, 1934, the taxpayer deducted $167,029.08 for processing taxes (R. 596).

The taxpayer communicated with other packers in Louisville, Kentucky, to obtain a record of their operations during the six-year period preceding the imposition of the processing tax on

hogs for the purpose of making a comparison of their average margin for such period with the taxpayer's margin for the taxable year, but without success. The Commissioner did not furnish the taxpayer with such data. The taxpayer, in its unjust enrichment tax return, or otherwise, has not furnished the Commissioner with any marginal computations of representative concerns for the six-year period preceding the imposition of the processing tax, nor has it requested the Commissioner to furnish it such information. (R. 597-598.)

For the fiscal year ended October 31, 1934, the taxpayer paid processing taxes in the amount of $167,029.08. The taxpayer paid processing taxes of $36,236.80 for the months of November and December, 1934. (R. 597.) Processing taxes in the amount of $95,048.62 for the remainder of the taxable year ended October 31, 1935, were imposed upon but not paid by the taxpayer (R. 597) due to a restraining order against collection of the tax (R. 596). The taxpayer filed an unjust enrichment tax return on May 15, 1937, disclosing a loss of $136,283.92 in pork operations during the entire taxable year. The return was not placed in evidence. (R. 598.)

The Commissioner computed a net income of $101,041.89 for the entire taxable year from the sale of articles processed from hogs, and net income of $91,665.93 from the sale of pork with respect to which the processing tax was imposed but

not paid (R. 598). He determined that the entire amount of unpaid processing tax, computed to be $87,058.73, instead of $95,048.62, was income to the taxpayer and subject to the unjust enrichment tax imposed by Title III of the Revenue Act of 1936 (R. 597–598).

In his determination of the deficiency, the Commissioner eliminated sales of purchased pork from his computation of net income by deducting from the total of all sales of pork products, the cost of such pork, plus 1½ cents per pound, the total thus deducted being $178,922.54. The mark-up of 1½ cents per pound was estimated by the Commissioner. (R. 598–599.)

After the Tax Court rendered its opinion on the basis of these findings (R. 599–621), motions for reconsideration were filed by the Commissioner (R. 621–630) and by the taxpayer (R. 630–645). An order modifying the opinion in certain respects was thereafter entered (R. 649–655). The Tax Court determined a deficiency in unjust enrichment tax for the taxable year ended October 31, 1935, in the amount of $38,840.41, and a penalty of $9,710.10 (R. 661). This decision was entered in accordance with a computation submitted by the Commissioner, to which the taxpayer filed written agreement (R. 661).

The taxpayer (R. 662) and the Commissioner (R. 664–665) petitioned for a review of the decision of the Tax Court. The circuit court of appeals affirmed the decision of the Tax Court ex-

cept that it held that error had been committed in allowing certain legal fees as a deductible item in computing net income (R. 688–689).[1]

ARGUMENT

1. The taxpayer argues that the Commissioner's determination of a tax deficiency, being based neither on evidence that the tax burden had been shifted nor on the statutory presumption arising out of marginal comparisons (see Section 501 (e), Appendix, *infra,* pp. 18–19), was arbitrary and void. On that premise, it invokes the decision of this Court in *Helvering* v. *Taylor,* 293 U. S. 507, as authority for the proposition that the courts below improperly accepted the Commissioner's determination as presumptively correct and erroneously failed to place the burden on the Commissioner to prove the amount of tax due (Pet. 27–29).

A short answer to this contention is that the determination, being supported by the evidence in this record, is not arbitrary and capricious. The Tax Court held that the evidence as a whole showed that the taxpayer had shifted the burden of the unpaid processing taxes (R. 601). In keeping its books and making its sales, the taxpayer treated those taxes as items of cost (R. 353–355, 258–259). It endeavored to obtain the highest possible prices for its products (R. 358)

[1] The taxpayer waives any issue as to this item in its petition for certiorari (Pet. 17).

and it recovered the amount of the processing taxes as an item of cost (R. 359). The taxing act contemplated that the consuming public should pay the processing tax.[2] Since the taxpayer endeavored to pass the tax on, this necessarily gave rise to the inference that the tax was shifted.[3]

The second facet of the taxpayer's argument in this respect is equally untenable. This argument is based upon the theory that, since the taxpayer was not in business during the six-year base period before the imposition of the tax, the Commissioner, under Section 501 (f) (Appendix, *infra,* pp. 19–20), had the duty of producing, for use in computing the presumptive amount of tax shift under Section 501 (e), an average margin for such base period from a comparison with representative concerns engaged in a similar business and similarly situated. But under Section 503 (b) (Appendix, *infra,* p. 21) and Article 27 (b) of Treasury Regulations 95 (Appendix, *infra,* p. 23), it was the duty of the taxpayer to file a return on the pre-

[2] *United States* v. *H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992 (C. C. A. 8th). And the meat-packing industry generally sought to shift the burden of the tax to the public. See *Cudahy Packing Co.* v. *United States*, 152 F. 2d 831, 835–836 (C. C. A. 7th).

[3] *Colonial Milling Co.* v. *Commissioner*, 132 F. 2d 505 (C. C. A. 6th); *Greenwood Packing Plant* v. *Commissioner*, 131 F. 2d 815 (C. C. A. 4th); *Andrew Jergens Co.* v. *Conner*, 125 F. 2d 686 (C. C. A. 6th); *Sellmayer Packing Co.* v. *Commissioner*, 146 F. 2d 707 (C. C. A. 4th).

scribed form and to clearly set forth the data called for therein. Furthermore, Section 501 (e) (2) is applicable only if the taxpayer so elects in filing his return on that basis. The tax return filed by the taxpayer was not placed in evidence (R. 598, 604); consequently there is no showing that the taxpayer made the required election or that it furnished in its returns the information required by the statute and the regulations.[4] Cf. *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293. All the record shows (R. 603) is that the tax return claimed a net loss of $136,283.92 for the taxable year which, under Section 501 (a) (1) (Appendix, *infra,* p. 17), would, if true, avoid the payment of any unjust enrichment tax. The taxpayer did not submit in its tax return or otherwise any marginal computations of representative concerns and did not at any time request the Commissioner to furnish such information. (R. 597–598.) Indeed, it did not even submit marginal data with respect to its own operation for the taxable year involved. Without this no comparison with the margins of representative concerns could be made. *Lee Wilson & Co.* v. *Commissioner,* 123 F. 2d 232 (C. C. A. 8th).

It is obvious, therefore, that *Helvering* v. *Taylor,* 293 U. S. 507, is not applicable here. In

[4] See *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232 (C. C. A. 8th), holding that failure to furnish such marginal data does not require the Commissioner to furnish information as to the average margins of similar concerns.

that case, it was shown by the taxpayer's evidence that the Commissioner's apportionment of value between preferred and common stock was "arbitrary and excessive". (P. 515.) Nevertheless, the Board of Tax Appeals had sustained the Commissioner's determination. That is not the situation here. The Commissioner's determination here was supported by the evidence.

The case of *Pyramid Coal Corp.* v. *Commissioner,* 138 F. 2d 748 (C. C. A. 7th), relied upon by the taxpayer (Pet. 7) as creating a conflict, contains a statement that, on the facts there involved, the Commissioner should have determined the taxpayer's average margin by comparison with other representative concerns. That view was taken only after the court had disapproved of the procedure which the Commissioner employed. Here the courts below found plain support from the record to sustain the Commissioner's determination as modified in the taxpayer's favor (R. 600–601). The *Pyramid Coal* case does not suggest that in such circumstances there should be any inquiry into the average margins of representative corporations. As a matter of fact, the observations in the *Pyramid Coal* case seem to be pure dictum, since the court did not remand the case or require the Commissioner to make a comparison with representative concerns. On the contrary, the court expressly found (p. 751) that the taxpayer's affirmative evidence was sufficient to overcome any presumption that it shifted any part of the tax

and reversed the Tax Court's determination on that ground. The taxpayer's argument with respect to the *Pyramid Coal* case obviously depends upon an acceptance of its premise that the Commissioner's determination was arbitrary under the principle of *Helvering* v. *Taylor, supra.* As shown above, that case has no application here.

While the taxpayer (Pet. 17–20) criticizes the opinions of the circuit court of appeals, it is clear that that court reached a correct result even if it be assumed that reliance was placed upon a wrong ground or upon a wrong reason.[5] The court's discussion of whether the statute and regulations required an additional tax may be disregarded. The court did not require any additional imposition upon the taxpayer, but affirmed the decision of the Tax Court except with respect to an issue which the taxpayer now concedes. No substantial error can be predicated upon views which thus did not result in any prejudice.

2. The Tax Court did not err in allocating receipts and expenses between own-slaughtered and purchased pork in determining the amount of net income subject to the tax imposed by Section 501 (a) (1) of the Revenue Act of 1936. It took voluminous evidence and considered the case for more than a year before rendering its findings of fact and opinion. Motions for reconsideration by the Commissioner and the taxpayer

[5] *Helvering* v. *Gowran*, 302 U. S. 238, 245–246; *Riley Co.* v. *Commissioner*, 311 U. S. 55, 59.

followed and were considered by the Tax Court for nearly another year before it entered an order (R. 649–655) amending its original opinion in certain respects. The outcome of all this was that the Tax Court agreed with the Commissioner on some problems of allocation and with the taxpayer on others; and on still others it disagreed with both and acted on its independent view of the evidence (R. 609–620). Certainly, it and the court below were correct in declining to disregard the Commissioner's determination entirely merely because some inaccuracies and errors were found. Cf. Pet. 21, 23, 31–33. The taxpayer and its witnesses repeatedly stated that any allocation must necessarily rest upon estimates and assumptions which in their nature could not be more than roughly accurate (R. 202, 282, 415, 607).

The Tax Court's findings are amply supported by the evidence. As pointed out by the circuit court of appeals (R. 686), the findings of fact and the opinion deal with every factual aspect of the controversy. And it is clear that fixing on an appropriate allocation formula is exclusively the function of the Tax Court under principles well settled by this Court.[6]

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[6] *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Boehm* v. *Commissioner*, 326 U. S. 287, 293; *Wilmington Co.* v. *Helvering*, 316 U. S. 164.

CONCLUSION

The courts below correctly decided this case. There is no conflict of decisions nor any other objection warranting review by this Court. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
SEWALL KEY,
Acting Assistant Attorney General.
J. LOUIS MONARCH,
NEWTON K. FOX,
Special Assistants to the Attorney General.

NOVEMBER, 1946.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE III—TAX ON UNJUST ENRICHMENT

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

* * * * *

(c) The net income from the sales specified in subsection (a) (1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis, the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from

such sales the allocable portion of the deductions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a) (1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

(e) For the purposes of subsection (a) (1), (2), and (3), the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with

respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a) (2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "average margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question, except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to

furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

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(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. * * *

* * * * *

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

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SEC. 503. ADMINISTRATIVE PROVISIONS.

(a) All provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this title, be applicable with respect to the taxes imposed by this title, except that the provisions of sections 101, 131, 251, and 252 shall not be applicable.

(b) Every person (1) upon whom a Federal excise tax was imposed but not paid, * * * shall make a return under this title, which return shall contain such information and be made in such manner as the Commissioner, with the approval of the Secretary, shall prescribe. * * *

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Treasury Regulations 95, promulgated under Section 501 (c) of the Revenue Act of 1936:

ART. 10. *Apportionment and allocation of deductions in computing net income.*— No general rule may be stated for ascertaining the proper proportion of the allowable deductions from gross income which are deductible pursuant to sections 501 (c) (1) and 501 (c) (2) of the Act. The statutory term "gross income" means the gross profit from sales ascertained by deducting from the amount of the "sales" the "cost of goods sold." In determining the gross income from sales, no deductions should be made for such items as selling expense, losses, interest or borrowed money, general administrative expense or items not ordinarily used in computing the "cost of goods sold," and certain items of depreciation and taxes. However, it is recognized that no uniform method of accounting can be prescribed for all taxpayers and the law contemplates that each taxpayer shall adopt

such forms and system of accounting as shall clearly reflect his income. Accordingly, if the taxpayer, as a consistent practice, has charged some of the above items to "cost of goods sold" such practice will not be disturbed unless the method of computing the "cost of goods sold" does not reflect the true net income, in which case proper adjustment will be required.

The allowable deductions from gross income (under the Revenue Act applicable to the taxable year in question) which appertain to the articles with respect to which the computation is being made and have not been included in computing the "cost of goods sold" shall be allocated and apportioned as follows:

(1) Deductions specifically applicable to particular items of gross income shall be allocated to such items:

(2) No rule may be stated for allocating or apportioning the deductions which can not be allocated under paragraph (1), above, that would be applicable in all cases. The proper allocation of these deductions will depend upon the facts and circumstances in each case. However, it may be stated that such deductions may ordinarily be apportioned ratably over all items of gross income.

The taxpayer should include as a part of his return a statement explaining the manner in which he ascertained and reported in the return the "cost of goods sold," and showing the method of allocation and apportionment of the deductions allowable under the applicable Revenue Act."

Art. 27. *Returns.*—

* * * * *

(b) The return shall be under oath and shall be made on the prescribed form in accordance with the instructions printed thereon and in accordance with the regulations. Copies of the prescribed return forms may be obtained by taxpayers from collectors. A taxpayer will not be excused from making a return because of the fact that no return form has been furnished to him. Taxpayers should make application therefor to the collector in ample time to have their returns prepared, verified, and filed with the collector on or before the due date. Each taxpayer shall carefully prepare his return so as fully and clearly to set forth the data therein called for. Returns which have not been so prepared will not be accepted as meeting the requirements of the Act.

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